



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL SUIT 202 OF 2009**

**MICHAEL MAINA GITONGA.....PLAINTIFF**

**VERSUS**

**SERAH NJUGUNA *Alias* SERAH WANJIKU MUNGAI.....DEFENDANT**

**JUDGMENT**

The claim relates to an accident involving a motor vehicle KVC 502 driven by the plaintiff and KBA 170Z driven by the defendant along Nairobi-Nakuru Highway near Stem Hotel. The plaintiff sustained:

- i) multiple fracture of the pelvis
- ii) dislocation of the right hip with displaced fracture of the right acetabulum;
- iii) comminuted fractures of the right tibia and fibula on the proximal end with fracture of the tibia plateau;
- iv) soft tissue injuries of the chest.

He instituted this action against the defendant claiming:

- i) general damages and future medical expenses – Kshs.2,850,000/=
- ii) special damages – Kshs.95,430/=
- iii) costs and interest as well as 16% VAT.

Parties recorded a consent on liability at the ratio of 80:20 in favour of the plaintiff. What therefore falls for determination is the quantum of damages payable to the plaintiff.

Learned counsel for the parties filed submissions which can be summarized as follows:

For the plaintiff, it was submitted that from the medical evidence, the plaintiff would have to undergo total hip replacement, which operation can only be performed overseas. The cost of the operation in India or South Africa was estimated at Kshs.2,850,000. Other than the hip injury, it was submitted, the

plaintiff underwent considerable pain and suffering arising from the other injuries as well as many operations including the insertion of screws on the right leg and insertion of a urethra catheter. As a result of the injury to the pelvis, the plaintiff's right lower limb is shortened by about 6 cm thereby affecting his symmetry and balance of the spinal column. The plaintiff has to rely on crutches for his mobility.

The plaintiff was examined by four doctors who were unanimous on the injuries sustained and the effect on him. The only point of departure was the degree of disability. Dr. Kiamba awarded 50% permanent disability, Dr. Mugenya 18%, while Dr. Malik awarded 20%. Dr. Wambugu did not assess disability.

Counsel further submitted that the cost of replacing the hip joint at Kikuyu Mission Hospital is Kshs.230,000, a prosthetic joint for the damaged right knee costs Kshs.280,000/= while endoscopic urethrotony will cost Kshs.180,000/=. For future medical expenses, counsel submitted for Kshs.1,500,000/- citing the cases of **Ahamed Mohamud Adma V. Jimmy Tomino**, Nakuru HCCC 224 of 1998, **Edward Mzamili Katana V. CMC Motors Group Limited & Another** (200)e KLR and **John Nyamu Kamau V. Bamburi Portland Cement Company Limited** Msa. HCCC No.557 of 1995.

In summary, the plaintiff seeks:

- |  |                                 |
|--|---------------------------------|
| i) future medical expenses               | - Kshs.1,500,000                |
| ii) general damages – pain and suffering | - Kshs.4,000,000                |
| iii) special damages                     | - Kshs. <u>75,000</u>           |
| Total                                    | - Kshs. <b><u>5,576,500</u></b> |

For his part, learned counsel representing the defendant submitted that the plaintiff's proposal of Kshs.5,576,500/= is not only exaggerated but also unfounded and meant for unjust enrichment. Counsel dismissed Dr. Kiamba's assessment of degree of permanent disability (of 50%) as lacking basis and urged the court to go by the estimation of Doctors M.S. Malik and Mugenya (both consultant surgeons).

With regard to future medical expenses, learned counsel for the defendant submitted for Kshs.400,000/= made up of the surgeon's fees at Kshs.250,000/= and Kshs.150,000/= for hospitalization. After the operation to correct the pelvis, counsel argued that the degree of permanent incapacity will get close to normal status. This, in turn should affect the general damages. For that reason and in view of the injuries, counsel submitted for Kshs.750,000/= as damages for pain and suffering.

In support of his propositions, counsel relied on the cases of **Dirima Tema Machuyu & others V. Kingera Bus Service**, Nbi. HCCC No.108 of 1989, **Eliud Kiprop Sigei V. Geoffrey Kariuki Njuguna & others**, Nbi. HCCC No.3149 of 1990, **James Ngugi Kamoche V. Joseph Muniu & 3 others**, Nbi HCCC No.2727 of 1991, **Mary Onyango V. Joannes Akula & Another** (2005) e KLR, **Ossuman Dhahir Mohammed & another V. Saluro Muhumed**, Nbi Civil Appeal No.30 of 1997, **Everest Odhiambo V. Gilgil Telecommunications Industries Limited**, Nakuru HCCC No.162 of 2005, **Joshua Mwaniki Nduati V. Samuel Muchiri Njuguna** (2005) e KLR, **Samuel Kibet Ngetich V. Robert Nandwa Sunguti & Another** (2007) e KLR.

In assessing the quantum of damages in any personal injury claim, the following principles must always be borne in mind:

- i) Assessment of damages is a matter of opinion and discretion and depends on the facts and circumstances of each case.
- ii) Money (an award) cannot renew a physical frame that has been battered and shattered. The award is only to give reasonable compensation.

iii) Awards must be assessed with moderation.

iv) It is desirable that so far as possible comparable injuries should be compensated by comparable awards.

v) In awarding damages fairness must be observed to both the plaintiff and the defendant as ultimately it is the tax payers who have to pay, thereby injuring the body politic.

Starting with the head of pain and suffering and always bearing in mind the foregoing principles, no doubt the plaintiff suffered fairly serious injuries. As I have observed earlier, three of the doctors who examined him gave varied degrees of incapacity, with the highest being that of Dr. Kiamba at 50%. It will be borne in mind that Dr. Kiamba examined the plaintiff on 16<sup>th</sup> May, 2009, just one week (on 23<sup>rd</sup> May, 2009) before Dr. Mugenya who assessed permanent disability at 18%, while Dr. Malik who examined the plaintiff several months later (two years) on 1<sup>st</sup> September, 2011 awarded 20% incapacity.

Learned counsel for the defendant attributed the large discrepancy between the last two assessments and that of Dr. Kiamba to their level of specialization; that the last two are consultant surgeons while Dr. Kiamba is a general practitioner. I do not want to make such a conclusion, suffice, however, to observe that professionals must strive to uphold the integrity of their profession by being objective in whatever services their expertise has been requested.

It is discrepancies like what we have been treated to in this case that brings professions into disrepute. Why would three professionals give such a varied assessment, with two almost unanimous and a third one giving a figure that is almost 2½ times higher?

I reiterate that the four doctors who examined the plaintiff (including Dr. Wambugu – another consultant surgeon – who did not award disability) were unanimous as to the seriousness of the injuries. Indeed this court had the opportunity to see him in court.

Relying on **Ahmed Mohamud** (supra), **Edward Mzamili** (supra) and **John Nyamu** (supra), the plaintiff's counsel has proposed Kshs.4,000,000/= for pain and suffering. On the other hand, learned counsel for the defendant has suggested Kshs.750,000/= relying on nine (9) authorities. The two proposals are two worlds apart.

From the authorities cited by the defendant, only two are close to the instant situation. In **Eliud Kiprop**, the injuries were more or less the same as those suffered by the plaintiff. The injuries in that case were fracture of the right acetabulum and dislocation of the hip. Right lower limb was shortened by 3 cm. It was recommended that the hip be replaced. An award for general damages in the sum of Kshs250,000/= was made in 1994.

**Mary Anyango** (supra) suffered fracture of the pelvis fracture of the molar teeth of the lower jaw and a compound fracture of the left femur with a disability of 20%. She was awarded Kshs.500,000/= in 2005. Finally, **Ossuman Dhahir** (supra), the Court of Appeal awarded in 1997 Kshs.700,000/= to the respondent for fractures of pubic ramii, of the right sacro-iliac joint and destruction of the urethra wall. These injuries and the effect on the life of the respondent are clearly more severe. The plaintiff's proposal is based on an decision in **Ahmed Mohamud** (supra) where an award of Kshs.1,900,000/= was made in respect of the following injuries:

- amputation of the left lower limb;
- multiple fractures of the tarsal bones of the right foot and burns on the planter aspect of the foot;
- compound fracture of the right malleolus and dislocation of the right ankle joint;
- burns of the planter aspect of the right foot

- stiffness of the ankle joint with a 70% degree of incapacity.

In **Edward Nzamili**, the plaintiff suffered:

- head injury leading to concussion;
- cut wound and bruises of the scalp;
- fracture of the left scapula
- compound fracture and dislocation of the left elbow
- chest injury with multiple fractures of left 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> ribs
- fracture of the left femur upper 1/3 shaft.

Kshs.2,000,000/= was awarded.. On the other hand, Kshs.1,500,000/= was awarded in **John Nyamu** for:

- left brachial plexes injury with complete paralysis of the right upper limb;
- dislocation of left shoulder;
- compound fracture of the right tibia/fibula –fixed with metal and screws.

Considering the degree of injuries in all the above cases cited by both sides and the period when the awards were made, I will award for pain and suffering Kshs.1,500,000/=.

Under the head, future medical expenses, the plaintiff, relying on the advice of Dr. Muoki which advice was reiterated by Dr. Kiamba, contended that hip replacement procedure is not available locally.

In India or South Africa the cost of the operation was given as Kshs.2,850,000/=, a figure Dr. Mugenya finds exaggerated and opines that it would cost in India a fraction of that amount. He did not rule out the procedure being available in Nairobi. Dr. Wambugu was however specific that the surgery is available in most hospitals in Kenya and named some of such hospitals as Kenyatta National Hospital, Kikuyu Orthopedic Rehabilitation Hospital, Aga Khan Hospital, Nairobi Hospital, Mater Hospital and A.I.C. Kijabe Hospital. In Kenyatta, he estimated the cost of total hip replacement at Kshs.180,000/=. Dr. Malik has cited the cost at Kikuyu Mission Hospital as Kshs.230,000/=.

With these suggestions, learned counsel for the plaintiff appears to have re-evaluated his earlier Kshs.2,850,000/= and has suggested Kshs.1,500,000/=. The defendant has proposed, in the light of Drs. Wambugu's and Malik's report as well as Fees Guidelines for Medical/Dental Practitioners 2<sup>nd</sup> Ed. (2006), Kshs.400,000/= to include the hospital expenses and the doctor's fees.

In the entire Guidelines, the single most expensive surgery is that revision of total hip or knee at Kshs.160,000/= (minimum) and kshs.180,000/= (maximum). Considering how long the plaintiff may remain in hospital for this procedure, the consumable and medicine, I find nothing unconscionable about the proposal of Kshs.400,000/=: which I hereby award.

In his oral submissions, learned counsel for the plaintiff had no issues with the claim for special damages. In the plaint, Kshs.95,430/= was proposed but Kshs.76,500/= was proved and is hereby awarded. There will be judgment for the plaintiff against the defendant as follows:

- General damages for pain suffering - Kshs.1,500,000
- Future Medical expenses - Kshs. 400,000

• Special damages	-	Kshs.76,500
Less 20%	-	<u>Kshs.395,300</u>
Total award	-	<b><u>Kshs.1,581,200</u></b>

I also award costs and interest.

**Dated, Signed and Delivered at Nakuru this 28<sup>th</sup> day of May, 2012.**

**W. OUKO**  
**JUDGE**